SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 26

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALCEA BAND OF TILLAMOOKS, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF OF ERNEST L. WILKINSON AND JOHN W. CRAGUN, AMICI CURIAE

ERNEST L. WILKINSON,
JOHN W. CRAGUN,
Amici Curiae.

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Opinion Below

The opinion of the Court of Claims (R. 61-83) is reported in 59 F. Supp. 934.

Jurisdiction

The judgment of the Court of Claims was entered on April 2, 1945 (R. 84). A motion by the United States for a new trial was denied on June 4, 1945 (*ibid.*). The petition

for a writ of certiorari was filed on August 31, 1945, and was granted on October 22, 1945 (R. 85). The jurisdiction of this Court is invoked under § 1 of the special jurisdictional act under which the case was instituted in the court below (Act of August 26, 1935, c. 686, 49 Stat. 801), and under the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. § 288 (b).

The special jurisdictional act provides that jurisdiction is conferred on the court below "with the right of appeal to the Supreme Court of the United States by either party, as in other cases," etc. Notwithstanding the special jurisdictional act was adopted subsequent to 1925,[1] certiorari and not appeal is the correct mode of review. *Shoshone Tribe of Indians* v. *United States*, 324 U. S. 335, 337; *cf.* Robertson & Kirkham (1936), *Jurisdiction Sup. Ct. U. S.*, § 219, p. 376, note 47.

The judgment below is non-final, the court merely having found that respondents "are entitled to recover," but reserving "judgment as to the amount of recovery and the amount of offsets, if any, . . . for further proceedings." Jurisdiction rests on the Act of February 13, 1925, *supra*. *Shoshone Tribe of Indians* v. *United States*, 324 U. S. 335, 337. Therefore, the provisions of that act that this Court may review on certiorari "any case" in the Court of Claims —without any requirement that the judgment shall be final—invests this Court with jurisdiction. *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 202-3, and note 3.

Questions Presented

Whether respondent Indian tribes have any legal and equitable claims arising under or growing out of their

[1] Compare, as to a situation where the special jurisdictional act was adopted before the Act of 1925 covering review by this Court, *Colgate* v. *United States*, 280 U. S. 43, 47-48, 49; *Assiniboine Indian Tribe* v. *United States*, 292 U. S. 606.

original title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by respondents, within the meaning of the special jurisdictional act in this case (Act of August 26, 1935, 49 Stat. 801, § 1[b], R. 23).

Statutes Involved

The statutes are set out in the findings and opinion of the Court of Claims (R. 23).

Statement

Each of respondent Indian tribes exclusively occupied, held, and used tracts of land in the State of Oregon from time immemorial (Finding 6, R. 35-36). The areas of land occupied by each of the tribes and bands were more or less accurately described with clearly defined boundaries, and were in the exclusive possession and use of respondents (Finding 11, R. 39).

The United States, under authority of Congress, treated with respondents for a surrender of a portion of their lands; but the treaties were never ratified (Finding 2, R. 23-27).

Respondents either went upon or were removed to lands which it had been agreed in the unratified treaties were to be retained by them as a reservation. This reservation, known as the Coast or Siletz Reservation, included lands occupied under original Indian title by part of respondent tribes. Part of this reservation has been taken from them, since they moved upon it, by Executive order and by statutes; but except for small benefits allowed respondents upon still other dispositions of their land in the Coast or Siletz Reservation, respondents never received any compensation for the taking of their Indian title to the lands in the unratified treaties that they had agreed to surrender, or which in the Coast or Siletz Reservation had been dis-

posed of without their consent (Finding 12, R. 39-40; see also Finding 34, R. 58).

The Court of Claims held (R. 70-77) that where the United States consents to be sued for a taking of original Indian title, to establish liability on behalf of the United States it is sufficient to show first that the Indians had an "original Indian title" and that that title was taken without their consent. It found the original title of the Indians by immemorial use and occupancy to be established as a matter of fact; that the United States subsequently took the same, and that the United States consented to be sued on such a title (as is provided in § 1 (b) of the jurisdictional act (R. 61-62)). It held that the liability of the United States therefore followed.

Summary of Argument

Now that Congress has permitted the United States to be sued for common law torts no one doubts that if the ingredients of a tort are proved, that liability will follow. By a parity of reasoning, now that Congress in the present case permits the United States to be sued for the taking of "Indian title" it should follow that if the taking of "Indian title" be proved liability should follow.

The contention of petitioner that the jurisdictional act only creates a forum does not reach the question at issue; namely, whether the taking of "Indian title" is a wrong to respondent, now that Congress has made it justiciable. The whole history of the United States shows that "Indian title" was a property right and that the taking of it did injure and was a wrong to respondents. Respondent has successfully proved loss of "Indian title" and is entitled to recover.

Argument

There is no statute which provides that a tort against an individual can not be committed by the United States.

And yet until a scant few weeks ago (Federal Tort Claims Act, § 401 of the Act of August 2, 1946, Pub. No. 601, c. 753, 79th Cong., 2nd Sess.), a citizen whose rights were tortiously invaded by the Government was without remedy—until and unless Congress passed a special jurisdictional act entitling him to sue in the Court of Claims. But now that the Government has consented to be sued it is liable to the same extent as an individual for any common-law tort committed by it.

The claim of an Indian tribe for the taking or destruction of its "Indian title" is an analogous case. One might as well argue that a citizen suffering damages through the tort of the agents of the United States in the prosecution of government business had no right to be free of such interference, as to argue that the Indian tribes of the United States had no rights whatever in their homes and property, simply because no treaty or statute provided against interference with the specific property of the particular Indian tribe. The argument of appellant that although under their original title Indians could continue to occupy their lands and be protected therein by the Government from any invasion of their rights and from dispossession by private parties, the United States could nevertheless at any time and upon any occasion terminate the Indian right of occupancy by a confiscation of Indian lands, and that a jurisdictional act permitting respondents to bring suit for the taking of such original Indian title did not contemplate an adjudication of liability against the United States, even upon findings of fact by the court that the petitioners held such original Indian title and that it had been confiscated by the government, is entirely unsound.

That argument follows the identical pattern which the Government has urged for a generation in the Court of Claims in attempting to defeat claims brought under spe-

cial jurisdictional acts—namely, that without the jurisdictional act no "liability" could be fastened on the United States; that the jurisdictional act makes no admission of "liability"; and that it consequently follows that the government cannot be held liable even though its negligence is proved and damages have been suffered. But this argument has been just as consistently rejected. The Court of Claims has found no difficulty in holding the United States to the same standard of legal responsibility as would be held in the case of a defendant which did not have sovereign immunity from suit. *Butler Lumber Co.* v. *United States*, 73 C. Cls. 270, 285, 289, 292; *Walton* v. *United States*, 24 C. Cls. 372, 376; *Snare & Triest* v. *United States*, 46 C. Cls. 109, 50 C. Cls. 201; *Boudinot* v. *United States*, 18 C. Cls. 716, 728; *Radel Oyster Co.* v. *United States*, 78 C. Cls. 816, 823; *Stubbs* v. *United States*, 86 C. Cls. 152; *Meagher* v. *United States*, 86 C. Cls. 450; *Goltra* v. *United States*, 91 C. Cls. 42; *Indians of California* v. *United States*, 98 C. Cls. 583, 599; *Melcher & Brinskelle* v. *United States*, 101 C. Cls. 777; *Howard* v. *United States*, 101 C. Cls. 823; *Mansfield* v. *United States*, 89 C. Cls. 12, 22: Cf. *Harbor Springs* v. *United States*, 72 C. Cls. 32.

The fallacy of the contention advanced by petitioner in this case and in the tort cases referred to revolves about what Mr. Justice Holmes called the "encysting of ideas" in phrases which "thereafter for a long time cease to provoke further analysis". *Hyde* v. *United States*, 225 U. S. 347, 391. The word "liability" is used in the cases stating that the special jurisdictional act does not "admit liability" in an entirely different sense from that in which it is used in, for instance, *Radel Oyster Co.* v. *United States*, 78 C. Cls. 816, 824, where it was said as to the jurisdictional act there involved, "The intention of the Congress was to create a liability where heretofore there was no liability in this par-

ticular case." Confusion in the statement of the doctrine and wide misunderstanding of the statements of the courts might have been averted if some more analytical regard had been had for the content of such words as "rights" and "liabilities." The content of such words has been the subject of legal philosophical dissertation over a great part of our legal history; and a rather clear chart for the use of such words—or at least the analysis of the legal relationships which are involved in the use of the words—was years ago set forth by Professor Hohfeld. HOHFELD, *Fundamental Legal Conceptions* (1923), pp. 36, 50, *et passim.* Walter Wheeler Cook in his introduction to *Hohfeld, supra,* p. 9, refers to the fact that "the conceptions for which the terms 'liability' and 'disability' stand have been criticized by Dean Pound of the Harvard Law School as being quite 'without independent jural significance' "—citing Pound's discussion of *Legal Rights* in (1916) 26 International Journal of Ethics, 92, 97. In petitioner's argument in the present case, there is this same subtle shift in the meaning of the word "liability" between its use in the major and the minor premises of defendant's proposition.

In any of the cases in which it has been held that a jurisdictional act does not admit "liability" but merely provides a forum, it will be found that the contention of the plaintiff which the court was meeting was that the jurisdictional act established that the government must pay damages irrespective of the responsibility which an ordinary individual defendant might have in the circumstances, and that the only question which the jurisdictional act left open was how much the damages were. In this sense of the word, of course the jurisdictional acts did not admit "liability." A typical case is *Stanton & Jones* v. *United States,* 68 C. Cls. 379, 389-390, where the court notes that "The plaintiffs repeat a contention oftentimes made, that the only issue in the case,

made so by the special act, 'is the amount of such damages and losses.' * * * What the act provides is a forum to which the plaintiffs may resort, with the right to have the cause of action adjudicated and determined. We fail to discover in the language of the act an acknowledgment of liability; * * *."

The converse of this repeated contention of plaintiffs in the court below has been the opposite extreme adopted in the argument of petitioner in this case—that since no "liability" (in the sense of susceptibility to the entry of a judgment for damages) would exist apart from the special jurisdictional act, that no "liability" (in the sense of responsibility for its torts) could be found even after the passage of a jurisdictional act. As above noted, neither has this extreme been adopted by the court to which these special jurisdictional act cases are traditionally referred. See cases cited *ante*.

The clear effect of a jurisdictional act, as the court below has observed, is to subject the United States to the same possibilities of "liability" (in the sense of susceptibility to the entry of judgment against it) as in the case of an individual. That is to say, after the claimant proves in court that the conduct in question would constitute a tort for which an individual would be liable, then the United States admits "liability" (in any sense). But it is up to the claimant to prove his case against the government to the same degree as he would have to do in the case of a private individual—as to whom, of course, he could never establish a case merely by proving the quantum of his "damages" and without proving that "liability" (in the sense of responsibility) attaches. *Walton* v. *United States*, 24 C. Cls. 372, 376; *Butler Lumber Co.* v. *United States*, 73 C. Cls. 270, 285, 289, 292.

A jurisdictional act must be construed to have this much effect or else it is a perfectly meaningless act on the part

of Congress, as the court below said in *Radel Oyster Co.* v. *United States*, 78 C. Cls. 816, 824. If the jurisdictional act is not effective to permit adjudication of an action *ex delicto*, "the report of the committee in charge of the act clearly discloses that Congress was enacting legislation to no effect whatever." *Butler Lumber Co.* v. *United States*, 73 C. Cls. 270, 292. And as the court said in *Carroll* v. *District of Columbia*, 22 C. Cls. 104, the jurisdictional act in such a view "is a barren right". In the present case, Congress well understood that it was conferring a jurisdiction broader than mere claims for taking an Indian title "recognized"[2] by treaty or the equivalent; for in clause (a) of the act it conferred that jurisdiction; consequently the further grant in clause (b) of jurisdiction respecting "original Indian title" can not be read as petitioner attempts to read it, or else Congress engaged in double talk and made a perfectly meaningless and hypocritical gesture in the so-called grant of jurisdiction. The argument of the first part of appellant's brief (Brief, p. 16)

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[2] "Recognized" Indian title, as used by petitioner and in earlier cases, is an inexact concept, referring varyingly to an outright treaty promise to respect the Indian title (so used in *Northwestern Shoshones* v. *United States*, 324 U. S. 335, 338-339), an executive acknowledgment that the particular Indians had an Indian title (that is, similar to "recognition" in the international-law sense, *United States* v. *Brooks*, 10 How. 442, 459-460), and the general acknowledgment of this government, which had also prevailed with all European discoverers of this country, that Indians in aboriginal use and occupancy of lands had a title to be respected (*United States As Guardian* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 345-346). Petitioner attempts, through the shifting concepts embodied in the word "recognized", to establish that lack of "recognition" in the contract or treaty sense establishes respondents' no-right in any sense. This Court has pointed out the barren effect of such epithetical denomination of Indian rights, notwithstanding which, the Court has said, "Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians. * * * At the same time, the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388-389.

that the jurisdictional act did not create liability but merely provided a forum does not reach the crux of this case for respondent does not contend that liability was established by the jurisdictional act per se. The question here is whether, the government having waived its political defense by making a deprivation of "Indian title" a justiciable controversy can now say that in taking such land no wrong was done to respondents, i. e., whether the taking of respondent's aboriginal home where they gained their livelihood, fought, loved, died, even as you and I, constituted a tort or injury to respondent.

Under the rule heretofore applied to jurisdictional acts—that they confer the same right to recover from the government that the person claiming to be wronged would have against an individual, the right of recovery is plain. No person other than petitioner would be permitted to divest respondents of their original Indian title. *United States, As Guardian* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339. Petitioner concedes (Brf., p. 19) that "An Indian right of occupancy, whether or not formally recognized by the sovereign, has always been protected against the acts of private individuals, * * *." See also p. 20 of petitioner's brief.

The argument of petitioner (Brf., pp. 19-33) that respondents' original Indian title did not constitute a right of property against the sovereign and that no "liability" flowed from the invasion of respondents' title by the sovereign is a mere play on words and a perversion of historical fact.

If, as the appellant contends, Indians had no right, nothing to trade, nothing to sell, under their original title, it would seem to follow that the language of treaties providing for an exchange of lands was just so many words. The mere fact that only the sovereign could buy and that there

was no remedy for the Indians under the law if the government confiscated land held under original Indian title does not lead to the conclusion that the Indian had nothing, no rights of any value.

As stated in Cohen in his authoritative Handbook of Federal Indian Law, p. 321:

> "If title by aboriginal occupancy is simply equivalent to a tenancy at will, the land cannot be sold to the sovereign. Yet the practice of the United States and of the British Crown, before 1776 of purchasing land from the Indians, and the validity of conveyances thus effectuated has never been questioned. As Marshall, C. J. observed, when sovereigns claimed "the exclusive right to purchase" they "did not found that right on a denial of the right of the possessor to sell."
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> *Worcester* v. *Georgia*, 6 Pet. 515.

Mr. Cohen, in effect, reiterated this statement of Indian right of property in a recent popular article in Colliers' American Weekly of January 19, 1946, entitled, "How We Bought the United States." Therein, he relates how we traditionally recognized the Indians' right of property in land under their right of immemorial use and occupancy, citing how Congress in 1794 agreed to pay the Iroquois $4,500.00 annually forever "in red calico and other goods" in exchange for their lands.

That the Indians themselves regarded their right of occupancy as a valuable property interest is obvious from the report of Secretary of War Knox to President George Washington as early as May 23, 1789 (American State Papers, Class II, Vol. I, 1789-1815, p. 8), which stated:

> "That it may be proper to observe that the Indians are greatly tenacious of their lands and generally do not relinquish their right, excepting on the principle of a specific consideration expressly given for the purchase of the same.

> "That the practice of the late English colonies and governors in purchasing Indian claims, has firmly established the habit in this respect."

The second statute respecting Indians enacted by the new Congress (Ordinance of 1787, Act August 7, 1789, 1 Stat. 50) also indicated a respect and recognition of Indian right of occupancy. Article three provided:

> "* * * The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property rights they shall never be invaded or disturbed."

With respect to the land of the very Indian tribe petitioning in this suit the Governor of Oregon, Joseph Love (Annual Report, Commissioner of Indian Affairs, Nov. 9, 1849) wrote the Secretary of State as follows:

> "As far as I have been able to see and converse with the Indians I find them friendly and well disposed. But many of them complain, they say the whites have settled their country, killed their game, brought among them sickness which has caused many deaths, that they are rapidly passing off; that the white people have promised them from year to year and from time to time that the United States Government would send out a governor * * * and commissioners to purchase their lands and pay for them. They are anxious to *sell* and the people are exceedingly sensitive on the subject. The exposure of families and property in the absence of male population makes it more desirable at this time than at any other since the settlement of the territory that they should *sell*." (Italics supplied.)

This report as to the respondent Indians leaves no doubt that it was the opinion of this tribe and the Government officials dealing with them that their aboriginal Indian title represented a property right even against the government.

It has been the consistent policy from the commencement of our government, as well as the policy of the European sovereignties which preceded that government, to consider the perpetual use and occupancy of the Indians as a "right" of the Indians. The "right" which the Indians lost to the sovereign upon discovery of this country was political sovereignty in the international sense—a very different matter from the "right" of the Indians to their peculiar land tenure. As Chief Justice Marshall said in *Johnson* v. *McIntosh*, 8 Wheat. 543, 574:

> "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necesarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, *with a legal as well as just claim to retain possession of it*, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.
>
> "While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.
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> "The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles." (Italics added.)

In *Mitchell* v. *United States*, 9 Pet. 711, 745, it is said:

> "• • • One uniform rule seems to have prevailed from their first settlement, as appears by their [British] laws; that friendly *Indians were protected in the*

possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.

"Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent." (Italics added.)

The most recent official recognition of the traditional policy of this country, contrary to the contention of appellant, that Indian title is a property right, which this country has intended to respect, is found in the official statement issued by President Truman on August 13, 1946, when signing the Indian Claims Commisison Act, passed by the last Congress (Public No. 726; 79th Cong., 2nd Sess.). In referring to that measure, which inter alia grants jurisdiction to the newly created Commission to determine claims founded upon "the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment of compensation agreed to by the claimant"[3] President Truman said:

"I am glad to sign my name to a measure (H. R. 4497) which removes a lingering discrimination against our

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[3] With respect to this grant of jurisdiction which was in the bill as it originally passed the House, but was struck by the Senate and reinserted by the Conferees, the Statement of the House Managers said:

"* * * the second of these classifications covers claims arising from the taking by the United States of Indian lands, i. e., lands to which tribal claimants had 'Indian title' or the 'right of occupancy.' Sometimes these lands were taken under the guise of unratified treaties, sometimes without any semblance of a treaty. The reinsertion of this classification makes it plain that where claimant can prove sufficient facts within the language of this classification the Commission has full authority to award proper damages therefor."

First Americans and gives them the same opportunities that our laws extend to all other American citizens to vindicate their property rights and contracts in the courts against violations by the Federal Government itself.

"This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights. Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 per cent of our public domain, paying them approximately 800 million dollars in the process. It would be a miracle if in the course of these dealings—the largest real estate transaction in history—we had not made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements with some 200 tribes. But we stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made.

"I hope that this bill will mark the beginning of a new era for our Indian citizens. They have valiantly served on every battle front. They have proved by their loyalty the wisdom of a national policy built upon fair dealing. With the final settlement of all outstanding claims which this measure insures, Indians can take their place without special handicap or special advantage in the economic life of our nation and share fully in its progress."

Respondent's brief (p. 11) collects the many other cases asserting that original Indian title is really a title—that it establishes rights. The mere fact that the United States has the political power to extinguish these rights and refuses to redress the grievances thereby occurring does not prove that there is no right in the persons thus divested.

Until a jurisdictional act is passed, the Indians are wholly without remedy for this invasion of their property. If their property be taken by conquest, the courts of the conquerer can not weigh the political propriety of its government making the conquest. *Johnson* v. *McIntosh*, 8 Wheat. 543, 588. If the taking is by act of Congress or by Executive action or by simple failure to restrain the nationals of the acquiring power, the problem raised is still political.[4] No matter how plain the "recognition" (in any sense: see note 2, *ante* p. 9) of the rights of the Indians to their lands, or how solemnly it was contracted by the United States that those rights would not be invaded, still "the power has always been deemed a political one, not subject to be controlled by the judicial department of the government," and the courts are held without authority, absent a jurisdictional act, to interfere. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565, 567-568; *cf. United States, As Guardian* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 347. In default of legislation authorizing suit, an Indian tribe cannot even sue or be sued by a private individual respecting its rights. *Thebo* v. *Choctaw Tribe of Indians* (C. C. A. 8th, 1895), 66 Fed. 372. The contractual ("recognized," in one sense of petitioner's use of the word, note 2, *ante*) nature of the rights is immaterial; the political department of the government alone determines all such matters—until a juris-

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[4] The brief of the appellant in stating that prior to the decision below no court has ever held the United States to be liable for the taking of land held under recognized, original Indian title (*Shoshone Indians* v. *United States*, 324 U. S. 335) failed to disclose, however, that the court recognized that jurisdictional acts had been enacted which provided for the adjudication of claims arising out of original Indian title as well as for adjudication of claims under treaties. The fact that the findings in previous cases did not permit recovery would appear to afford no basis for denying relief in a situation such as the present one where Congress again permitted suit on claims arising out of original Indian title and the findings of fact were such as to result in an adjudication of liability on the part of the United States.

dictional act is passed. It sues private individuals to vindicate the rights of the Indians, its wards. *United States, As Guardian* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 343.

But once a jurisdictional act is passed authorizing suit, then if the Indians can prove their rights they are entitled to recover. *United States* v. *Creek Nation*, 295 U. S. 103, 110; *United States* v. *Shoshone Tribe*, 299 U. S. 476, 304 U. S. 111; *United States* v. *Klamath & Moadoc Tribes*, 304 U. S. 119, 123. Here the Indians, upon the adoption of the jurisdictional act, were faced with the burden of establishing their original Indian title—their aboriginal right to their ancestral home. That presented "a question of fact to be determined as any other question of fact." *United States, As Guardian* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 345. That burden has been successfully borne; the fact has been established; and, in the light of the jurisdictional act, the political nature of the question no longer exists as a bar to recovery. Respondent's right to recover was properly found by the court below.

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

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